DALLAS COUNTY
JOHN VANCE
DISTRICT ATTORNEY
CIVIL SECTION

RQ-862

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Opinion Committee

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FILE # ~~ML 36130-95~~

I.D. # 36130

September 21, 1995

Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Re: Constitutionality of Section 5.04 and 5.05 of Chapter 655, 74th Legislature

Dear General Morales:

On behalf of the Dallas County Clerk, we respectfully request an Attorney General's Opinion concerning the constitutionality of a portion of House Bill 1863 which was enacted by the 74th Legislature as Chapter 655, § 5.04. Acts 1995, 74th Leg. ch. 655, §§ 5.04 and 5.05. This part adds section 1.045 and amends section 1.07(a)(1) of the Texas Family Code.

The specific issue presented for decision is whether or not new sections 1.045 and 1.07(a)(1) of the Texas Family Code, which in effect prohibit individuals who owe delinquent court-ordered child support from entering into a ceremonial marriage in Texas, are constitutional under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. A discussion of the applicable law controlling this issue follows:

As enacted, § 5.04 of Chapter 655 amends Subchapter A, Chapter 1, Family Code by adding Section 1.045 which reads as follows:

> **Sec. 1.045. STATEMENT REGARDING PAYMENT OF CHILD SUPPORT.** (a) An applicant for a marriage license shall submit to the county clerk a statement witnessed by two credible persons and verified before a person authorized to take oaths stating that as of the date the application for a marriage license is filed the applicant does not owe delinquent court-ordered child support.
>
> (b) A child support payment is considered delinquent for purposes of Subsection (a) if the child support obligee under

> a child support order that applies to the applicant is entitled to seek enforcement of an arrearage under Subchapter B, Chapter 14.
>
> (c) A person commits an offense if, with intent to deceive and with knowledge of the statement's meaning, the person submits a false statement under this section.
>
> (d) An offense under this section is a state jail felony.

If the statement required by section 1.045 is not filed, the amendment to section 1.07(a)(1) provides that the County Clerk may not issue a license to the applicant:

> **Section 1.07(a)(1). ISSUANCE OF MARRIAGE LICENSE.** (a) Except as provided by Subsection (b) of this section, the county clerk may not issue a license to the applicants if:
>
> (1) either applicant fails to provide information as required by Sections 1.02, 1.045, and 1.05 of the code;

A marriage license is required before a person may enter into a ceremonial marriage in Texas. Tex. Fam. Code Ann. § 1.01 and § 1.82 (Vernon 1993). Thus, the net result of new section 1.045 and section 1.07(a)(1) of the Family Code is that individuals who owe delinquent court-ordered child support will be prohibited from entering into a ceremonial marriage in Texas since such marriage cannot be performed without a valid marriage license.

We believe under the principles announced by the U.S. Supreme Court in ***Zablocki v. Redhail***, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), new sections 1.045 and 1.07(a)(1) of the Texas Family Code are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Furthermore, we believe the new sections are unconstitutional under the Due Process Clause based on the Supreme Court's concurring opinions in *Zablocki v. Redhail* and based on the principles articulated in ***Loving v. Virginia***, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) and ***Boddie v. Connecticut***, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

In evaluating a law under the Equal Protection Clause of the Fourteenth Amendment, the first thing that must be determined is the appropriate level of judicial scrutiny under which the challenged law should be analyzed. *Zablocki*, 434 U.S. at 383, 98

S.Ct. at 679 (citing ***Memorial Hospital v. Maricopa County***, 415 U.S. 250, 253, 94 S.Ct 1076, 1079-1080, 39 L.Ed.2d 306 (1974)). Under traditional Equal Protection analysis, the U.S. Supreme Court has articulated three levels of judicial scrutiny in examining classifications made by particular statutes: "strict judicial scrutiny," "intermediate standard of review," and "rational basis test"; ***Zablocki***, 434 U.S. at 407, 98 S.Ct. at 692 (Rehnquist, J., dissenting). Which level should be applied to a challenged statute is determined "by looking to the nature of the classification and the individual interests affected" by the challenged statute. ***Id.***, at 383, 98 S.Ct. at 679 (quoting ***Memorial Hospital***, 415 U.S. at 253, 94 S.Ct. at 1079-1080.

The decision to marry is a fundamental right. ***Zablocki***, 434 U.S. at 383-386, 98 S.Ct. at 679-681; and ***Loving v. Virginia***, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); ***see also Turner v. Safley***, 482 U.S. 78, 95, 107 S.Ct. 2254, 2265, 96 L.Ed.2d 64 (1987). As such, any statutory classification which "interfere[s] directly and substantially with the right to marry" will be subjected to "rigorous scrutiny" analysis[1]. ***Zablocki***, 434 U.S. at 386, 98 S.Ct. at 681. Under this standard of analysis, a law which "significantly interferes with the exercise of [the] fundamental right" to marry cannot be upheld under the Equal Protection Clause unless it is supported by "sufficiently important state interests and is closely tailored to effectuate only those interests." ***Id.***, at 388, 98 S.Ct. at 682.

In ***Zablocki***, the U.S. Supreme Court determined that a Wisconsin statutory classification, which in effect prohibited individuals delinquent in court-ordered child support obligations from marrying, significantly interfered with the fundamental right to marry[2], thereby warranting rigorous scrutiny analysis, or what is traditionally referred to as strict judicial scrutiny analysis, under the Equal Protection Clause. ***Id.***, at 383 and 386-87, 98 S.Ct. at 679 and 681. In applying that standard of analysis, the Supreme Court held that the Wisconsin statute violated the Equal Protection Clause of the United States Constitution. ***Id.***, at 388-391, 98 S.Ct. at 682-683. The Court accepted, for purposes of argument, that the interests advanced by the State in support of the statute were "legitimate and substantial." ***Id.***, at 388, 98 S.Ct. at 682. However, the Court held that the "means selected by the State for achieving these interests unnecessarily impinge[d] on the right to marry." ***Id.***

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[1]Although the term "strict judicial scrutiny" is not used in the opinion by the Court, the Court is obviously applying this standard to the challenged statute, which is the third and strictest level of Equal Protection analysis and is applied when a fundamental right is affected.

[2]For text of the Wisconsin statue See ***Zablocki***, 434 U.S. at 375 n1, 98 S.Ct. at 675 n 1.

Specifically, the Supreme Court held the interest asserted in support of the challenged statute that the welfare of prior children would be protected was not justified under the Equal Protection Clause. *Id.*, at 388-391, 98 S.Ct. at 682-683. The Court noted that with respect to individuals who were unable to meet the statutory requirements, the statute merely prevented marriage without delivering any money to the prior children. *Id.*, at 389, 98 S.Ct. at 683. Furthermore, and the Court felt more importantly, regardless of an individual's ability to meet the statute's requirements, the State had other means to ensure compliance with child support obligations that were at least as effective as the instant statute but did not impinge upon the right to marry. *Id.*

Moreover, the Supreme Court said the suggestion that the Wisconsin statute would help individuals meet support obligations to prior children by preventing the individual from incurring new support obligations was not justified. *Id.*, at 390, 98 S.Ct. at 683. The Court thought that a person could possibly improve their financial situation by getting married thereby enabling them to better support prior children. Id. In any event, the Court pointed out, an individual's support obligations to any new children born during the contemplated marriage would be the same whether married or not. *Id.* Thus, the net result of the statute is more children being born out of wedlock. *Id.*

Finally, there was evidence the Wisconsin statute was originally enacted in order to provide an opportunity to counsel persons with prior child support obligations before further obligations were incurred but allow marriage once counseling was completed. *Id.*, at 388-389, 98 S.Ct. at 682. However, the statute, as enacted, did not expressly require counseling nor did it provide for automatic approval for marriage once counseling was completed. *Id.* Thus, the Supreme Court said this interest was unjustified. *Id.*

In the present case, it is our opinion that new sections 1.045 and 1.07(a)(1) of the Texas Family Code create the same statutory "classification" which "significantly interferes" with the exercise of the fundamental right to marry, as did the Wisconsin statute. ***See Id.***, at 383, 98 S.Ct. at 679. As stated above, the net result of these new sections to the Family Code is the prohibition of a class of individuals who owe delinquent court-ordered child support from entering into a "ceremonial marriage" in Texas because such marriages cannot be legally performed without a marriage license. ***See*** Tex. Fam. Code Ann. § 1.01 and § 1.82 (Vernon 1993).

Although "common law marriage" is an option in Texas without obtaining a marriage license, ***Russell v. Russell,*** 865 S.W. 929 (Tex. 1993), such is not an acceptable alternative to many persons for religious and for various other reasons. Consequently, even those members of the statutory class who are able in theory to get married in Texas under the

common law will be "sufficiently burdened [by this statute] . . . so that they will in effect be coerced into forgoing their right to marry." *See Id.*, at 387, 98 S.Ct. 681.

Therefore, it is the opinion of our office that new sections 1.045 and 1.07(a)(1) to the Texas Family Code "significantly discourage[]" if not make "practically impossible" marriage by a person delinquent with court-ordered child support. ***See Id.***, at n. 12. As such, the Texas laws in question must be subject to "rigorous" or "strict" judicial scrutiny analysis under the Equal Protection Clause. In other words, the Texas laws in question must be supported by "sufficiently important state interests" and "closely tailored to effectuate only those interests" or the laws cannot be upheld under the Equal Protection Clause. ***See Id.*** at 388, 98 S.Ct. at 682. Applying these principles, new sections 1.045 and 1.07(a)(1) of the Texas Family Code do not withstand constitutional scrutiny under the Fourteenth Amendment.

Specifically, if the interest to be served by the new Texas laws is to protect the welfare of prior children, the U.S. Supreme Court has told us that if there are other means in the State to ensure compliance with child support obligations, then the statute is not justified under Equal Protection analysis. *Id.*, 389, 98 S.Ct. at 683. In Texas, there are numerous ways to enforce child support obligations that do not impinge on a fundamental right. Also, as the U.S. Supreme Court noted in ***Zablocki***, at 389, 98 S.Ct. at 683 with regard to the Wisconsin statute, the Texas laws in question will not in anyway help put money in the hands of prior children. *Id.*

Moreover, if the purpose of the new sections is to prevent individuals from incurring further child support debts, as the Supreme Court noted in ***Zablocki***, at 390, 98 S.Ct. at 683, this is not a sufficient interest since a person could actually better their financial situation to help make prior support obligations by getting married. In any event, an individual's financial responsibilities to any children born out of the contemplated marriage would be the same if married or not in Texas. *Id.*

Accordingly, it is our opinion that new sections 1.045 and 1.07(a)(1) of the Texas Family Law Code are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution pursuant to the principles announced in ***Zablocki v. Redhail*** and the cases cited therein.

Furthermore, it is our opinion that new sections 1.045 and 1.07(a)(1) of the Texas Family Law Code violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Although no U.S. Supreme Court case has specifically struck down any law similar to the Texas laws in question based on the Due Process Clause, the Supreme Court in ***Zablocki*** acknowledged that the "right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Precess Clause." *Id.*, at 384,

98 S.Ct. at 680 (**citing** ***Griswold v. Connecticut***, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)). Moreover, two Supreme Court Justices in concurring opinions in the ***Zablocki*** case felt that the Wisconsin statute, which was similar in effect to the Texas statute at issue, was unconstitutional under the Due Process Clause of the Fourteenth Amendment. ***Id.***, at 391, 98 S.Ct. at 684 (Stewart, J., concurring) and ***Id.***, at 400, S.Ct 98 at 688 (Powell, J., concurring).

In the leading case on marriage, ***Loving v. Virginia***, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), the United States Supreme Court struck down a Virginia miscegenation statute as unconstitutional under not only the Equal Protection Clause but also under the Due Process Clause of the Fourteenth Amendment. The Supreme Court stated:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our existence and survival. ***Id.*** at 12, 87 S.Ct, at 1824, quoting ***Skinner v. Oklahoma ex rel. Williamson***, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)

The Court could have based its opinion solely on the Equal Protection Clause. However, it went on to hold that the miscegenation statute arbitrarily deprived couples of a fundamental liberty protected by the Due Process Clause, the freedom to marry, and was therefore unconstitutional under the Due Process Clause as well. ***Loving***, 388 U.S. at 12, 87 S.Ct. at 1823.

Of additional relevance is the Supreme Court's opinion in ***Boddie v. Connecticut***, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). In that case, the Supreme Court recognized that "marriage involves interests of basic importance in our society," and held that a law which required filing fees for divorce actions violated the Due Process Clause. ***Id.***, at 376, 91 S.Ct. at 785.

Accordingly, based on the above, it is our opinion that new sections 1.045 and 1.07(a)(1) of the Texas Family Code similarly interfere with the right to marry implicit in the Due Process Clause's right of privacy and are therefore unconstitutional under the Fourteenth Amendment to the United States Constitution.

In conclusion, it is our opinion that sections 1.045 and 1.07(a)(1) to the Texas Family Code are unconstitutional under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,
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Assistant District Attorney
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TFK/jh

Opinion Prepared By:

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November 10, 1995

Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548, Capitol Station
Austin, TX 78711-2548

RE: Constitutionality of Section 5.04 and 5.05 of Chapter 655, 74th Legislature

Dear General Morales:

On behalf of the Howard County Clerk who is also the president of the Texas District and County Clerk's Association, we respectfully request an Attorney General's Opinion concerning the constitutionality of a portion of House Bill 1863 which was enacted by the 74th Legislature as Chapter 655 § 5.04. Acts 1995, 74th Leg. Ch.655 §§ 5.04 and 5.05. This part adds section 1.045 and amends section 1.07(a)(1) of the Texas Family Code.

The specific issue presented for decision is whether or not new sections 1.045 and 1.07(a)(1) of the Texas Family Code, which in effect prohibit individuals who owe delinquent court-ordered child support from entering into a ceremonial marriage in Texas, are constitutional under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. A discussion of the applicable law controlling this issue follows:

As enacted, § 5.04 of Chapter 655 amends Subchapter A, Chapter 1, Family Code by adding Section 1.045 which reads as follows:

> Sec.1.045 **STATEMENT REGARDING PAYMENT OF CHILD SUPPORT.** (a) An applicant for a marriage license shall submit to the county clerk a statement witnessed by two credible persons and verified before a person authorized to take oaths stating that as of the date the application for a marriage license is filed the applicant does not owe delinquent court-ordered child support.
>
> (b) A child support payment is considered delinquent for purposes of Subsection (a) if the child support obligee under a child support order that applies to the applicant is entitled to seek enforcement of an arrearage under Subchapter B, Chapter 14.

> (c) A person commits an offense if, with intent to deceive and with knowledge of the statement's meaning, the person submits a false statement under this section.
>
> (d) An offense under this section is a state jail felony.

If the statement required by section 1.045 is not filed, the amendment to section 2.07(a)(1) provides that the County Clerk may not issue a license to the applicants if:

> (1) either applicant fails to provide information as required by Sections 1.02, 1.045, and 1.05 of the code;

A marriage license is required before a person may enter into a ceremonial marriage in Texas. Tex.Fam.Code Ann.§ 1.01 and §1.82 (Vernon 1993). Thus, the net result of new section 1.045 and section 1.07(a)(1) of the Family Code is that individuals who owe delinquent court-ordered child support will be prohibited from entering into a ceremonial marriage in Texas since such marriage cannot be performed without a valid marriage license.

We believe under the principles announced by the U.S. Supreme Court in Zablocki v. Redhail, 434 U.S. 374,98 S.Ct.673,54 L.Ed.2d 618 (1978), new sections 1.045 and 1.07(a)(1) of the Texas Family Code are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Furthermore, we believe the new sections are unconstitutional under the Due Process Clause based on the Supreme Court's concurring opinions in Zablocki v. Redhail and based on the principles articulated in Loving v. Virginia, 388 U.S.1,87 S.Ct. 1817, 18 L.Ed.2d 1010(1967) and Boddie v. Connecticut, 401 U.S.371,91 S.Ct. 780, 28 L.Ed.2d 113(1971).

In evaluating a law under the Equal Protection Clause of the Fourteenth Amendment, the first thing that must be determined is the appropriate level of judicial scrutiny under which the challenged law should be analyzed. Zablocki, 434 U.S. at 383,98 S.Ct. at 679 (citing Memorial Hospital v. Maricopa County,415 U.S. 250,253,94 S.Ct.1076, 1079-1080, 39 L.Ed.2d 306 (1974). Under traditional Equal Protection analysis, the U. S. Supreme Court has articulated three levels of judicial scrutiny in examining classifications made by particular statutes: "strict judicial scrutiny," "intermediate standard of review," and "rational basis test". Zablocki,434 U.S.at 407, 98 S.Ct. at 692 (Rehnquist,J. dissenting). Which level should be applied to a challenged statute is determined "by looking to the nature of the classification and the individual interest affected" by the challenged statute.(Id. at 383,98 S.Ct. at 679 (quoting Memorial Hospital, 415 U.S. at 253, 94 S.Ct. at 1079-1080.

The decision to marry is a fundamental right. Zablocki, 434 u.s. AT 383-386, 98 S.Ct. at 679-681; and Loving v. Virginia, 388 U.S. 2,87 S.Ct. 2817, 18 L.Ed.2d 1010(1967); **see also** Turner v. Safley, 482 U.S. 78, 95, 107 S.Ct.2254,2265,96 L.Ed.2d 64(1987). As such, any statutory classification which "interfere[s] directly and substantially with the right to marry" will be subjected to "rigorous scrutiny" analysis[1]. Zablocki, 434 U.S. at 386,98 S.Ct. at 681. Under this standard of analysis, a law which "significantly interferes with the exercise of [the] fundamental right" to marry cannot be upheld under the Equal Protection Clause unless it is supported by "sufficiently important state interests and is closely tailored to effectuate only those interests." **Id.**, at 388, 98 S.Ct. at 682.

In Zablocki, the U.S. Supreme Court determined that a Wisconsin statutory classification, which in effect prohibited individuals delinquent in court-ordered child support obligations from marrying, significantly interfered with the fundamental right to marry[2], thereby warranting rigorous scrutiny analysis, or what is traditionally referred to as strict judicial scrutiny analysis, under the Equal Protection Clause. **Id.**, at 383 and 386-387, 98 S.Ct. at 679 and 681. In applying that standard of analysis, the Supreme Court held that the Wisconsin statute violated the Equal Protection Clause of the United States Constitution **Id.**, at 388-391, 98 S.Ct. at 682-683. The Court accepted, for purposes of argument, that the interests advanced by the State in support of the statute were "legitimate and substantial." **Id.**, at 388,98 S.Ct. at 682. However, the Court held that the "means selected by the state for achieving these interests unnecessarily impinge[d] on the right to marry."**Id.**

Specifically, the Supreme Court held the interest asserted in support of the challenged statute that the welfare of prior children would be protected was not justified under the Equal Protection Clause. **Id.**, at 388-391, 98 S.Ct. at 682-683. The Court noted that with respect to individuals who were unable to meet the statutory requirements, the statute merely prevented marriage without delivering any money to the prior children. **Id.**, at 389, 98 S.Ct. at 683.

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[1]Although the term "strict judicial scrutiny" is not used in the opinion by the Court, the Court is obviously applying this standard to the challenged statute, which is the third and strictest level of Equal Protection analysis and is applied when a fundamental right is afffected.

[2]For text of the Wisconsin statute **See** Zablocki, 434 U.S. at 375 n1, 98 S.Ct. at 675 n1.

Furthermore, and the Court felt more importantly, regardless of an individual's ability to meet the statute's requirements, the State had other means to ensure compliance with child support obligations that were at least as effective as the instant statute but did not impinge upon the right to marry. **Id.**

Moreover, the Supreme Court said the suggestion that the Wisconsin statute would help individuals meet support obligations to prior children by preventing the individual from incurring new support obligations was not justified. **Id.** at 390, 98 S.Ct. at 683. The Court thought that a person could possibly improve their financial situation by getting married thereby enabling them to better

support prior children. **Id.** In any event, the Court pointed out, an individual's support obligations to any new children born during the contemplated marriage would be the same whether married or not. **Id.** Thus, the net result of the statute is more children being born out of wedlock.Id.

Finally, there was evidence the Wisconsin statute was originally enacted in order to provide an opportunity to counsel persons with prior child support obligations before further obligations were incurred by allowing marriage once counseling was completed.**Id.**, at 388-389, 98 S.Ct. at 682. However, the statute, as enacted, did not expressly require counseling nor did it provide for automatic approval for marriage once counseling was completed. **Id.** Thus, the Supreme Court said this interest was unjustified. **Id.**

In the present case, it is our opinion that new sections 1.045 and 1.07(a)(1) of the Texas Family Code create the same statutory "classification" which "significantly interferes" with the exercise of the fundamental right to marry, as did the Wisconsin statute. **See Id.**, at 383, 98 S.Ct. at 679. As stated above, the net result of these new sections to the Family Code is the prohibition of a class of individuals who owe delinquent court-ordered child support from entering into a "ceremonial marriage" in Texas because such marriages cannot be legally performed without a marriage license. **See** Tex.Fam.Code Ann.§ 1.01 and §1.82(Vernon 1993).

Although "common law marriage" is an option in Texas without obtaining a marriage license, Russell v. Russell, 865 S.W. 929 (Tex.1993), such is not an acceptable alternative to many persons for religious and for various other reasons. Consequently, even those members of the statutory class who are able in theory to get married in Texas under the common law will be "sufficiently

burdened [by this statute]...so that they will in effect be coerced into foregoing their right to marry." **See Id.**, at 387, 98 S.Ct.681.

Therefore, it is the opinion of our office that new sections 1.045 and 1.07(a)(1) to the Texas Family Code "significantly discourage[]" if not make "practically impossible" marriage by a person delinquent with court-ordered child support. **See Id.**, at n.12. As such, the Texas laws in question must be subject to "rigorous" or "strict" judicial scrutiny analysis under the Equal Protection Clause. In other words, the Texas laws in question must be support by "sufficiently important state interests" and "closely tailored to effectuate only those interests" or the laws cannot be upheld under the Equal Protection Clause.**See Id.** at 388, 98 S.Ct. at 682. Applying these principles, new sections 2.045 and 1.07(a)(1) of the Texas Family Code do withstand constitutional scrutiny under the Fourteenth Amendment.

Specifically, if the interest to be served by the new Texas laws is to protect the welfare of prior children, the U.S. Supreme Court has told us that if there are other means in the State to ensure compliance with child support obligations, then the statute is not justified under Equal Protection analysis.**Id.**,389,98 S.Ct. at 683. In Texas, there are numerous ways to enforce child support obligations that do not impinge on a fundamental right. Also, as the U. S. Supreme Court noted in Zablocki, at 389,98 S.Ct. at 683 with regard to the Wisconsin statute, the Texas laws in question will not in anyway help put money in the hands of prior children. **Id.**

Moreover, if the purpose of the new sections is to prevent individuals from incurring further child support debts, as the Supreme Court noted in Zablocki, at 390, 98 S.Ct. at 683, this is not a sufficient interest since a person could actually better their financial situation to help make prior support obligations by getting married. In any event, an individual's financial responsibilities to any children born out of the contemplated marriage would be the same if married or not in Texas. **Id.**

Accordingly, it is our opinion that new sections 1.045 and 1.07(a)(1) of the Texas Family Code are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution pursuant to the principles announced in Zablocki v. Redhail and the cases cited therein.

Furthermore, it is our opinion that new sections 2.045 and 1.07(a)(1) of the Texas Family Code violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Although no U.S. Supreme Court case has specifically struck down

any law similar to the Texas laws in question based on the Due Process Clause, the Supreme Court in Zablocki acknowledged that the "right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." **Id.**, at 384,98 S.Ct. at 680(citing Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Moreover, two Supreme Court Justices in concurring opinions in the Zablocki case felt that the Wisconsin statute, which was similar in effect to the Texas statute at issue, was unconstitutional under the Due Process Clause of the Fourteenth Amendment. **Id.**, at 391, 98 S.Ct. at 684 (Stewart,J., concurring) and **Id.**, at 400,S.Ct 98 at 688 (Powell, J., concurring).

In the leading case on marriage, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), the United States Supreme Court struck down a Virginia miscegenation statute as unconstitutional under not only the Equal Protection Clause but also under the Due Process Clause of the Fourteenth Amendment. The Supreme Court stated:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
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> Marriage is one of the "basic civil rights of man", fundamental to our existence and survival. **Id.** at 12, 87 S.Ct., at 1824, quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)

The Court could have based its opinion solely on the Equal Protection Clause. However, it went on to hold that the miscegenation statute arbitrarily deprived couples of a fundamental liberty protected by the Due Process Clause, the freedom to marry, and was therefore unconstitutional under the Due Process Clause as well. Loving, 388 U.S. at 12, 87 S.Ct. at 1823.

Of additional relevance is the Supreme Court's opinion in Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113(1971). In that case, the Supreme Court recognized that "marriage involves interests of basic importance in our society," and held that a law which required filing fees for divorce actions violated the Due Process Clause. **Id.**, at 376, 91 S.Ct. at 785.

Accordingly, based on the above, it is our opinion that new sections 1.045 and 1.07(a)(1) of the Texas Family Code similarly interfere with the right to marry implicit in the Due Process Clause's right of privacy and are therefore unconstitutional under the Fourteenth Amendment to the United States Constitution.

In conclusion, it is our opinion that sections 1.045 and 1.07(a)(1) to the Texas Family Code are unconstitutional under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

Hardy L. Wilkerson
County Attorney

HLW:mjo